

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

JAMES A. KAY, JR.)

Licensee of one hundred sixty)
four Part 90 licenses in the)
Los Angeles, California area)

To: The Commission

PR DOCKET NO. 94-147
WT DOCKET NO. 94-147

DOCKET FILE COPY ORIGINAL

MOTION TO ENLARGE, CHANGE OR DELETE ISSUES

JAMES A. KAY, JR.

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Dated: January 12, 1995

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Summary Of The Filing

James A. Kay, Jr. (Kay), by his attorneys, respectfully requests that the Commission enlarge, change, or delete certain of the issues designated in the above-captioned proceeding.

The Commission should enlarge the issues to include certain applications filed by Kay concerning which he has a right to be heard. Enlargement of the issues to include those applications would be fair to Kay and would be administratively efficient for the Commission.

The Order to Show Cause in the the above captioned proceeding designated certain licenses for hearing to which Kay is not a party. Accordingly, the Order to Show Cause should be changed to delete reference to those licenses.

The Order to Show Cause does not give Kay notice of the facts and law alleged against him sufficient to allow him to prepare an adequate defense. With respect to Designated Issues 10(a), and 10(c)-10(h), the Order to Show Cause did not give Kay sufficient notice of what is alleged against him. With respect to those issues, the Order to Show Cause is devoid of any fact constituting the Commission's allegation against Kay. With respect to some of those issues, the Order to Show Cause did not give Kay notice of the statute, rule or regulation which his was alleged to have violated.

For all the foregoing reasons, the Commission should enlarge, change or delete the issues designated in the above captioned Order to Show Cause.

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To: The Commission

MOTION TO ENLARGE, CHANGE OR DELETE ISSUES

James A. Kay, Jr. (Kay), by his attorneys, pursuant to Section 1.229 of the Commission's Rules, hereby respectfully requests that the Commission enlarge, change, or delete certain issues designated in the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (OSC). In support of his position, Kay shows the following.

On January 31, 1994, W. Riley Hollingsworth, Deputy Chief, Private Radio Bureau, Licensing Division (Hollingsworth), sent to Kay a letter pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. §308(b). The letter requested that Kay supply certain information. Subsequently, Hollingsworth sent to Kay a series of letters requesting that same information in support of certain then-pending applications for new or modified station licenses.¹ Kay responded to each of Hollingsworth's letters with respect to

¹ Those applications had been assigned file numbers 415060, 415082, 415236, 415237, 415243, 415255, 415274, 415294, 415303, 415304, 415315, 415316, 415317, 415319, 415321,

specific applications. Kay repeatedly demanded the right guaranteed to him by Section 309(e) of the Act, 47 U.S.C. §309(e), to a hearing on each of his applications.² *See, e.g.,* Exhibit I hereto.³ However, to date, the Commission has failed to afford Kay his right to a hearing on his applications. Instead, in violation of the right guaranteed to Kay by Section 309(e) of the Act, Hollingsworth dismissed most of Kay's applications.⁴

Because Section 309(e) affords Kay a right to a hearing on his applications which were unlawfully dismissed by Hollingsworth, and because enlarging the issues in the instant hearing

415322, 415333, 415347, 415367, 415369, 415374, 415382, 415392, 415407, 628816, 632210, 640638, 666464, and 666672.

² Section 309(e) provides, in relevant part, that

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally,

47 U.S.C. §309(e). Review of Sections 309(a) of the Act and Section 308, which is referenced at Section 309(a), clearly demonstrates that all of Kay's applications were subject to the procedural protection provided by Section 309(e) of the Act.

³ Among the applications referenced at Exhibit I hereto is an application filed by Marc Sobel d/b/a Airwave Communications, rather than by Kay. Hollingsworth erroneously attributed Sobel's application, file number 415367, to Kay.

⁴ Although Hollingsworth threatened to dismiss certain of Kay's applications by a letter dated October 28, 1994, to date the Commission has neither dismissed those applications nor granted Kay a hearing on them. Those applications had been assigned file numbers 415367, 415369, 415374, 415382, 415392, 415407, 666484, and 666672. Kay has filed a timely appeal of each dismissal action taken by Hollingsworth.

proceeding to include those applications will most expeditiously conduce to the ends of justice and administrative efficiency, Kay respectfully requests that the Commission enlarge the issues designated in the OSC to include each of the applications which are referenced at footnote 1, *supra*.⁵ If Kay is found in the instant proceeding not to possess the qualifications required to be a Commission licensee, then having the applications which are in dispute designated as a part of the instant proceeding would allow the Commission to dispose of the applications without further action. If Kay is found in the instant proceeding to have the requisite qualifications, then having the applications as a part of the instant proceeding will allow the Commission to proceed to immediate grant of those applications, without the necessity of engaging in any further action. Accordingly, the ends of justice and the Commission's interest in administrative efficiency can be served by enlarging the issues in the instant proceeding to include all of Kay's applications which were dismissed by Hollingsworth and which are still currently pending before the Commission.

On September 16, 1994, Hollingsworth set aside the Commission's grant to Kay of the license for Specialized Mobile Radio Service station WNMV402 at Mt. Lukens, California. In a timely manner, Kay requested reconsideration of that action. Consequently, that application is currently pending before the Commission.

⁵ Kay is not a party to the application of Marc Sobel, file number 415367, and, therefore, it is of no importance to Kay whether the Commission designates that application for hearing. However, Kay is concerned that the Commission treat Sobel's application fairly by not entangling Sobel's application in its controversy with Kay.

On November 18, 1994, Hollingsworth set aside the Commission's grant to Kay of renewal of three licenses. However, as released, the OSC did not designate Kay's renewal applications for hearing. Together with the applications which Hollingsworth threatened to dismiss, but which the Commission has not dismissed, the renewal applications are pending before the Commission. Accordingly, so that the Commission can reach a complete determination on the licensing of Kay in this proceeding, and so that the Commission avoids the necessity of later actions concerning the pending applications in the event that the Kay is found to be qualified to be a Commission licensee, the OSC should be revised to add an issue as to all of Kay's pending applications. In that way, the Administrative Law Judge can conveniently act in one statement to grant all of Kay's pending applications.

Attached to the OSC was an Appendix A, listing 164 call signs of Private Land Mobile Radio Services stations. For the following reasons, Kay respectfully requests that the Commission change or dismiss the OSC to delete all references to the licenses numbered 154 through 164.

James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. As shown by the affidavit of Marc Sobel attached as Exhibit II hereto, Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named

named as a party to the instant proceeding, the Commission should either change the OSC to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the OSC with respect to those stations.

Section 554(b)(3) of the Administrative Procedure Act, 5 U.S.C. §554(b)(3) provides that a person entitled to notice of an agency hearing shall be timely informed of "the matters of fact and law asserted." Because the OSC failed to provide Kay with lawful notice of the matters of fact and law asserted with respect to many of the issues designated for hearing, certain issues designated in the OSC should be deleted or changed.

At paragraph 10(a) of the OSC, the Commission designated an issue as to whether Kay had "violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to the Commission's inquiries". Section 308(b) of the Act is a grant of authority by Congress to the Commission. Section 308(b) does not impose any requirement or any prohibition on any person. Accordingly, Section 308(b) is not a statute which is capable of violation by an individual.

Similarly, Section 1.17 of the Commission's Rules is a statement of the Commission's authority. Section 1.17 of the Commission's Rules additionally provides that "no applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction

as a party to the instant proceeding, the Commission should either change the OSC to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the OSC with respect to those stations.

Section 554(b)(3) of the Administrative Procedure Act, 5 U.S.C. §554(b)(3), provides that a person entitled to notice of an agency hearing shall be timely informed of "the matters of fact and law asserted." Because the OSC failed to provide Kay with lawful notice of the matters of fact and law asserted with respect to many of the issues designated for hearing, certain issues designated in the OSC should be deleted or changed.

At paragraph 10(a) of the OSC, the Commission designated an issue as to whether Kay had "violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to the Commission's inquiries". Section 308(b) of the Act is a grant of authority by Congress to the Commission. Section 308(b) does not impose any requirement or any prohibition on any person. Accordingly, Section 308(b) is not a statute which is capable of violation by an individual.

Similarly, Section 1.17 of the Commission's Rules is a statement of the Commission's authority. Section 1.17 of the Commission's Rules additionally provides that "no applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction

of the Commission." However, the OSC did not allege any specific fact of any specific instance in which Kay either made any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission which was sufficient to allow a reasonable person to prepare an adequate defense. In the absence of any specific factual allegation as to any instance in which Kay either made a misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission, Kay was not given adequate notice of the issue designated against him. Therefore, the issue designated at paragraph 10(a) of the OSC should be deleted or the OSC should be changed to give Kay notice of the specific facts which constitute the allegation against him.

At paragraph 2 of the OSC, the Commission stated that it had "received a number of complaints regarding the construction and operation of a number of Kay's licensed facilities." At paragraph 10(c) of the OSC, the Commission designated an issue "to determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules." However, the OSC failed to give Kay notice of any fact of any specific instance in which he is alleged to have violated any of the rules referred to at paragraph 10(c).

Section 90.155 of the Commission's Rules requires that a station be constructed and placed in operation within a specified period of time. However, Rule Section 90.155 provides its own remedy for any failure by a licensee to complete construction and place a station in operation in a timely manner, namely, automatic cancellation of the license. By its own terms,

Section 90.155 is a "no-fault" rule, incapable of violation by any person to the extent that failure to act within the specified time has any consequence beyond automatic cancellation of the license. If Kay had failed to place a station in operation within the time allowed, he would have no valid license and there would be nothing for the Commission to revoke at the conclusion of the instant proceeding. Even if Rule Section 90.155 were capable of violation by a licensee, the OSC failed to provide Kay with notice of any fact concerning any instance in which he allegedly failed to construct a station or place it in operation in a timely manner. Since Rule 90.155 cannot be violated by a licensee in any manner that has any consequence beyond automatic cancellation of the license and because the OSC failed to give Kay notice of any instance in which he allegedly violated that Rule, the Commission should either delete reference to alleged violation of that Rule or should change the OSC to give Kay notice of the facts alleged against him which are sufficient to allow him to prepare a defense.

Rule Section 90.157 defines permanent discontinuance of station operation. Like Rule Section 90.155, Rule 90.157 is self-executing as to the remedy for permanent discontinuance of station operation, namely, automatic cancellation of the station license. By its own terms, Rule Section 90.157 is not susceptible to violation by any person to the extent that failure to continue station operation has any consequence beyond automatic cancellation of the license. If Kay had failed to continue operation of any station for the time set forth in the Rule, the license would have cancelled automatically and there would be nothing for the Commission to revoke at the conclusion of the instant proceeding. Since Rule 90.157 cannot be violated by a licensee in any manner that has any consequence beyond automatic cancellation of the license and because the

OSC failed to give Kay notice of any instance in which he allegedly violated that Rule, the Commission should either delete reference to alleged violation of that Rule or should change the OSC to give Kay notice of the facts alleged against him which are sufficient to allow him to prepare a defense.

Rule Section 90.313(a) establishes the maximum loading on certain channels. The OSC set forth no fact concerning any allegation that Kay had exceeded the maximum permissible loading on the channels covered by Rule 90.313. Rule Section 90.313(b) requires certain reporting by licensees. The OSC failed to make any allegation of fact that Kay had, in any specific instance, violated Rule Section 90.313(b). Because the OSC is bereft of any fact constituting an allegation that Kay had, in any specific instance, violated Rule 90.313, the Commission should delete reference to alleged violation of that Rule or should change the OSC to give Kay notice of the facts alleged against him which are sufficient to allow him to prepare a defense.

Section 90.623 of the Commission's Rules sets forth a multitude of requirements which a licensee might conceivably violate, and some which are not capable of being violated by any person.⁶ However, the OSC gave Kay no notice of a fact constituting an allegation that Kay had violated any specific portion of the Rule. Because the OSC is devoid of any fact constituting an allegation that Kay had, in any specific instance, violated any portion of Rule 90.623, the

⁶ Subsequent to the release of the OSC, amendments to Rule Section 90.623 became effective, removing some of the limitations and requirements.

Commission should delete reference to alleged violation of that Rule or should change the OSC to give Kay notice of the facts alleged against him and of the specific subsection or subsections of the Rule which he is alleged to have violated which are sufficient to allow him to prepare a defense.

Rule Section 90.631 contained, at the time of the release of the OSC, a collection of provisions, some of which might be violated by a licensee, and some of which cannot be violated by any person. Rule 90.631(a) establishes a standard, but imposes no requirement on anyone. Accordingly, Kay could not have violated Rule 90.631(a). Rule 90.631(b) had a variety of requirements, including a requirement that an applicant make a certification to the Commission. The OSC contained no fact constituting an allegation that Kay had failed to make any required certification. Section 90.631(b) also provided automatic cancellation of a license in the event of the licensee's failure to meet the stated requirement, which, by its own terms, constitutes a complete remedy for the licensee's failure. Rule Section 90.631(c) required a licensee seeking to expand a trunked system to have met a certain requirement. However, the OSC failed to present any fact constituting an allegation that Kay had failed, in any specific instance, to have violated Rule 90.631(c). Kay does not do business in any rural area, and, therefore, it is clear to Kay that he is not alleged to have violated Rule 90.631(d), which applies only to rural systems. Rule Sections 90.631(e)&(f), like Rule 90.155, establish a period of time within which a station must be constructed and placed in operation, and like Rule 90.155, provide the sole and

automatic remedy for a licensee's failure to meet the requirement.⁷ Kay has never been authorized for or even applied for a wide area system or a ribbon system, and, accordingly, has no reason to believe that he could possibly have violated Rule Sections 90.631(g)&(h). Kay is not the licensee of any SMRS station in the band covered by Rule Section 90.631(i), and, therefore, has no reason to believe that he could possibly have violated Rule Section 90.631(i). Because the OSC provided no fact constituting an allegation that he had violated any specific subsection of Rule 90.631 in any specific instance, the OSC failed to give Kay notice of the facts alleged against him or the specific rule of law which he was alleged to have violated which was sufficient to allow him to prepare an adequate defense. Accordingly, Kay respectfully requests that the Commission either delete the reference to Rule 90.631 from paragraph 10(c) of the OSC or that it change the OSC to give him adequate notice of the facts and law which the Commission desires to place in issue.

Section 90.633 of the Commission's Rules contained, at the time of the release of the OSC, a variety of provisions, some of which are susceptible to being violated by a licensee, and some of which are not. The OSC failed to inform Kay of which subsection or subsections of Rule 90.633 he was alleged to have violated. Rule Sections 90.633(a)&(b) establish standards and conditions on licenses, but are not capable of being violated by any person. Rule Section 90.633(c), like Rule 90.155, establishes the period of time within which a station must be

⁷ Rule Section 90.631(f), as published at 47 C.F.R. §90.631(f), also provided a standard for determining whether a licensee had permanently discontinued operation of a station. However, the Commission suspended enforcement of that rule almost immediately it had adopted it and has never lifted the suspension.

constructed and placed in operation. Like Rule Section 90.155, it provides its own, self-activating remedy for a licensee's failure to meet the deadline, namely, automatic cancellation of the station license. Because Rule 90.633(c) provides an automatic consequence for a licensee's failure to act within the specified time, such a failure has no consequence beyond automatic cancellation of the license. If Kay had failed to place a station covered by Rule 90.633(c) in operation within the time allowed, he would have no valid license and there would be nothing for the Commission to revoke at the conclusion of the instant proceeding. Even if Rule Section 90.633(c) were capable of violation by a licensee, the OSC failed to provide Kay with notice of any fact concerning any instance in which he allegedly failed to construct a station or place it in operation in a timely manner. Rule Section 90.633(e) establishes the standard which a licensee must meet to qualify to apply for additional frequency pairs. The OSC provided not a single fact constituting an allegation that Kay had ever violated Rule 90.633(e). Kay is not a licensee of and has never applied for a wide area or ribbon configuration system, and, therefore, Kay could not possibly have violated those sections of the Commission's Rules. Since Rule 90.633(c) cannot be violated by a licensee in any manner that has any consequence beyond automatic cancellation of the license and because the OSC failed to give Kay notice of any instance in which he allegedly violated any specific portion of Rule 90.633, the Commission should either delete reference to alleged violation of that Rule or should change the OSC to give Kay notice of the facts alleged against him and the specific rule of law which he is alleged to have violated which are sufficient to allow him to prepare a defense.

At paragraph three of the OSC, the Commission stated that "information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names." Nothing in the Communications Act or the Commission's Rules prohibits a person from using a number of names in conducting his business before the Commission. Neither paragraph three nor paragraph 10(d) of the OSC made any allegation that in any specific instance Kay had used various names for purposes of violating any of the Commission Rules or any other specific rule of law. Paragraph three of the OSC listed a collection of names under which the Commission suggested that Kay may have done business, but nowhere in the OSC is there notice of any specific fact of any specific instance in which Kay is alleged to have used a specific name for the purpose of avoiding compliance with the Commission's Rules. In response to the Commission's January 31, 1994, inquiry, Kay informed the Commission of all names under which he did business. Paragraph three of the OSC includes all of the names under which Kay does business, demonstrating that the Commission knows all of the names.⁸ However, nowhere in the OSC is there any allegation that Kay used any specific name for the purpose of avoiding compliance with the Commission's Rules in any specific instance.

Since the allegation presented at paragraph three and the issue designated at paragraph 10(d) of the OSC were insufficient to give Kay notice of any specific instance in which he allegedly violated the Commission's Rules in any way, Kay respectfully requests that the

⁸ This is not to suggest that Kay admits that he has ever used all of the names listed at paragraph three of the OSC. Kay has never done business under most of the names listed at paragraph three of the OSC and a sufficient investigation by the Commission would have disclosed that fact to the Commission and satisfied it as to that situation.

Commission either delete as immaterial the allegation presented at paragraph three and delete the issue designated at paragraph 10(d) of the OSC. In the alternative, Kay respectfully requests that the Commission change the OSC in such a manner as would allow a reasonable person to have sufficient notice of the facts alleged against him to allow him to prepare an adequate defense.

At paragraph four of the OSC, the Commission stated that

We also have information that Kay may willfully cause interference to radio systems, including systems carrying public safety communications traffic, in order to coerce or mislead licensees into retaining him as their communications provider. Kay or his sales staff allegedly calls on the persons experiencing the interference and offers to provide them higher quality communications service.

Neither the statement presented at paragraph four of the OSC nor the issue designated at paragraph 10(e) of the OSC gave Kay notice of the facts alleged against him which is sufficient to prepare a defense. Paragraph four informs Kay only that some unknown named person has said that Kay "may"⁹ willfully cause interference to some unidentified person, at some unidentified place, at some unstated time, and that some unknown named person allegedly called on some unidentified person at some unstated time, offering to provide someone with communications service. At the least, Kay was entitled to notice as to the identity(ies) of his

⁹ The word "may" as used in the OSC is susceptible to multiple interpretations. It could be read as implying that the Commission has no knowledge, whatsoever, of the truth of the allegation which someone appears to have made against Kay. Improbably, it could be read as suggesting that Kay somehow has leave to willfully cause interference. It could be interpreted as suggesting that Kay continually engages in willfully causing interference. It could also be read as suggesting nothing more than that Kay might cause interference at some indefinite future time. Regardless of the way in which one may interpret the word "may", the OSC failed to give Kay notice of the facts of the allegation against him.

accuser, the identity(ies) of the station(s) with whose communications he allegedly may willfully interfere, the identity of the public safety entity(ies) with which he may have interfered, the identity(ies) of the station which Kay may have employed to willfully cause the alleged interference, and the dates, times, and places of all material events which constitute the allegation. Since it does not appear from the face of paragraph four that the Commission actually has anything more to present than an allegation by someone that Kay "may" have caused interference, and since the designated issue does not give Kay sufficient information on which to base a defense, Kay respectfully requests that the Commission delete the allegation presented at paragraph four and the issue designated at paragraph 10(e) of the OSC. Alternatively, Kay requests that the Commission change the OSC to provide him with notice of the facts alleged against him which is sufficient for him to prepare a defense.

At paragraph five of the OSC, the Commission stated that it had information which indicated that "Kay and his sales staff have misused the Commission's processes by, for example, fraudulently inducing licensees or others to sign blank Commission forms seeking modification of licenses or to sign forms the intent of which was misrepresented by Kay or his employees." At paragraph 10(f) of the OSC, the Commission designated an issue as to whether Kay "has abused the Commission's processes in order to obtain cancellation of other licenses." However, at paragraphs five and 10(f) the OSC failed to set forth any fact constituting an allegation that in any specific instance Kay had violated any statute or Commission rule or policy or committed any other wrongdoing within the Commission's jurisdiction. Because the OSC failed to set forth at paragraph five and paragraph 10(f) of the OSC any fact of any specific

instance in which Kay ever committed any act which violated a statute, a Commission rule or policy, or took any other action which would call into question his qualifications to be a Commission licensee, the Commission should either delete paragraphs five and 10(f) of the OSC or change the OSC to give Kay notice of the facts and law alleged against him which will be sufficient to allow him to prepare a defense.

Paragraph 10(g) of the OSC designated an issue "to determine, in light of the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr. is qualified to remain a Commission licensee". However, paragraph 10(g) did not specify the nature of the qualification of Kay which the Commission was placing in issue. Section 308(b) of the Act, 47 U.S.C. §308(a), provides that "all applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, or other qualifications of the applicant" Paragraph 10(g) of the OSC failed to specify the qualification or qualifications of Kay which the Commission has by regulation prescribed which it calls into question with respect to Kay. Because paragraph 10(g) did not place Kay in a position to prepare an adequate defense, the Commission should either delete the issue designated at paragraph 10(g) or change the OSC to inform Kay of the nature of the qualification which the Commission has placed in issue.

At paragraph 10(h) of the OSC, the Commission designated an issue "to determine if any of James A. Kay, Jr.'s licenses have automatically cancelled." However, paragraph 10(h) did

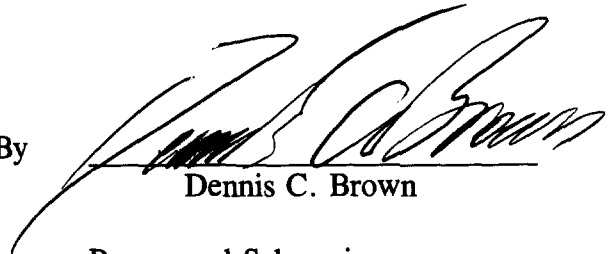
not provide any fact constituting an allegation that any specific license had cancelled automatically sufficient to allow Kay to prepare a defense.¹⁰ Because paragraph 10(h) was not sufficient to give Kay reasonable notice of the facts alleged against him, the Commission should either delete paragraph 10(h) from the OSC or should change the OSC to present allegations of fact concerning a specific station or stations sufficient to allow Kay to prepare an adequate defense.

Conclusion

For all the foregoing reasons, Kay respectfully requests that the Commission delete, enlarge or change the issues and other elements of the OSC as described herein.

Respectfully submitted,
JAMES A. KAY, JR.

By



Dennis C. Brown

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Dated: January 12, 1995

¹⁰ Since automatic cancellation of a license would leave the Commission with nothing to adjudicate, there is a certain lack of reasonableness and logic to designating for hearing an issue as to whether a license had automatically cancelled, and, therefore, no longer exists.

EXHIBIT I

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November 1, 1994

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Federal Communications Commission
Gettysburg, Pennsylvania 17325

Re: Application Nos. 415367, 415369, 415374, 415382, 415392,
415407, 666464, and 666672

Dear Mr. Hollingsworth:

We represent the radio system interests of James A. Kay, Jr., before the Federal Communications Commission. On behalf of Mr. Kay, we hereby respond to the Commission's letter to Mr. Kay dated October 28, 1994, concerning Mr. Kay's above referenced applications for radio station licenses in the Los Angeles, California, area.

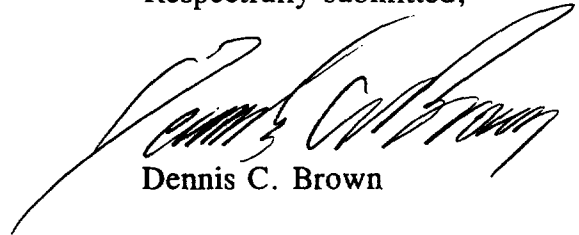
The Commission's October 28 letter stated that the Commission "requires answers to [its] letter to [Mr. Kay] dated January 31, 1994 which requested information to determine whether [Mr. Kay is] qualified to be a Commission licensee." Mr. Kay respectfully submits that the Commission does not require all or some of the information which it requested by its January 31 letter to make a determination that the public interest, convenience and necessity would be served by grant of the above referenced applications. However, for Mr. Kay's response to the Commission's January 31 letter, we respectfully direct your attention to letters which we filed with the Commission on Mr. Kay's behalf dated April 7, May 17, May 26, June 2, and June 30 and August 16, 1994. We also respectfully direct your attention to whatever information concerning Mr. Kay's facilities which you may have received from the United States Forest Service in response to your request to its Tujunga Ranger District dated August 31, 1994.

Section 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(2), provides that "if the Commission for any reason is unable to find that grant of [an] application would be consistent with subsection (a) [of Section 309], it shall proceed as provided in subsection (e)" of Section 309. Subsection (e) of Section 309 requires that

the Commission "formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally," 47 U.S.C. §309)(e). In view of the provisions of Section 309 of the Act, we respectfully submit that the threatened dismissal of any of Mr. Kay's above referenced applications because the Commission was not satisfied with his response to its January 31 letter would be contrary to law and a violation of his civil rights. We respectfully submit that if the Commission is unable for any reason to find that grant of any of the above referenced applications would be in the public interest, the Commission is required to designate the application for hearing and give Mr. Kay the required notice.

Mr. Kay would regard any action adverse to his above referenced applications prior to his being afforded the procedural rights provided to him by Section 309 of the Act as a clear violation of his constitutional right to due process of law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis C. Brown", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Dennis C. Brown

EXHIBIT II

AFFIDAVIT

I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay also holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on Jan 11, 1995.



Marc Sobel